

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: LAWRENCE C. PRESLEY, ETC., Appellants v.

ETOWAH COUNTY COMMISSION, ET AL. and

ED PETER MACK AND NATHANIEL GOSHA, III,

ETC., Appellants v. RUSSELL COUNTY

COMMISSION, ET AL.

CASE NO: 90-711 and 90-712

PLACE: Washington, D.C.

DATE: Tuesday, November 12, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LAWRENCE C. PRESLEY, ETC., :

4 Appellants :

5 v. : No. 90-711

6 ETOWAH COUNTY COMMISSION, ET AL. :

7 and :

8 ED PETER MACK AND NATHANIEL :

9 GOSHA, III, ETC., :

10 Appellants :

11 v. : No. 90-712

12 RUSSELL COUNTY COMMISSION, ET AL. :

13 - - - - -X

14 Washington, D.C.

15 Tuesday, November 12, 1991

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States at
18 2:00 p.m.

19 APPEARANCES:

20 EDWARD STILL, ESQ., Birmingham, Alabama; on behalf of
21 the Appellants.

22 ROBERT A. LONG, JR., ESQ., Assistant to the Solicitor
23 General, Department of Justice, Washington, D.C.; on
24 behalf of the United States as amicus curiae
25 supporting the Appellants.

1 PAUL M. SMITH, ESQ., Washington, D.C.; on behalf of the
2 Appellees.
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1 PROCEEDINGS

2 (2:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in 90-711, Lawrence Presley v. Etowah County
5 Commission, Peter Mack v. Russell County Commission. Mr.
6 Still.

7 ORAL ARGUMENT OF EDWARD STILL

8 ON BEHALF OF THE APPELLANTS

9 MR. STILL: Thank you. Mr. Chief Justice, and
10 may it please the Court:

11 This case presents the question, under section 5
12 of the Voting Rights Act, whether a county must submit for
13 preclearance a transfer of power away from an individual
14 county commissioner to either a white majority county
15 commission or an official appointed by that county
16 commission. We contend that these changes must be
17 submitted, because they affect the power of voters to
18 elect commissioners who can respond to citizens' wishes.

19 In Etowah County, this transfer occurred
20 immediately after the election of Lawrence Presley, the
21 first black county commissioner in the county's history,
22 and therefore diminished the power of that black county
23 commissioner. This, in turn, affected the power of the
24 black voters in his district to control roadwork in their
25 particular district.

1 In the South, roads have traditionally been the
2 main concern of county commissions. The road
3 commissioner's responsiveness to his constituents is
4 judged by how well he handles their complaints and
5 concerns about the roadwork.

6 QUESTION: Mr. Still, these two counties are not
7 adjacent, are they?

8 MR. STILL: No, sir, they are not.

9 QUESTION: One is in, where, northeast, and the
10 other one is on the east side?

11 MR. STILL: On the eastern border, yes, sir.
12 One of them is Phenix City and the other is Gadsden. If
13 you look on a map, that's the easy way to find them.

14 QUESTION: I'm glad to know how to pronounce the
15 one county's name. I --

16 MR. STILL: Yes, sir. It -- it's an old Indian
17 name, and it gets mispronounced quite often.

18 QUESTION: How do you pronounce it?

19 MR. STILL: Etowah.

20 QUESTION: Etowah.

21 MR. STILL: The --

22 QUESTION: What does it mean?

23 MR. STILL: I have no idea.

24 When the Etowah County Commission transferred
25 the power to control roadwork from the individual county

1 commissioners to the whole commission, it assured two
2 things. First of all, that the white voters in
3 Commissioner Presley's district would not have to go to a
4 black official to talk about their problems, and secondly
5 that black voters would still have to come to white
6 officials -- in this case a commission with a white
7 majority -- to talk about their roads.

8 QUESTION: Could you tell me, how many votes did
9 it take to pass the common fund resolution in Etowah
10 County?

11 MR. STILL: It took a majority of the six
12 members, and so it would have taken four votes, or the
13 chairman could have broken a tie of three, I believe.

14 QUESTION: And a total of six?

15 MR. STILL: There's a total of six, but there's
16 a seventh member who is a nonvoting chairman, and I
17 believe he has a tiebreaking power, so if they tie 3 to
18 3 --

19 QUESTION: All right, then I take it the same
20 answer to repeal the resolution -- same vote.

21 MR. STILL: That's correct, it would be.

22 In Russell County, the -- the transfer of power
23 occurred before blacks were elected, but in this case the
24 county is roughly 40 percent black. In 1979, when the
25 county adopted what's called the county unit system, which

1 allows the county engineer to control all the roadwork as
2 an entire unit in the county. Several nearby
3 jurisdictions in Alabama had already been forced to go to
4 single-member districts and had elected blacks. The
5 handwriting was on the wall that single-member districts
6 and black elected officials were coming to Russell County.

7 QUESTION: Can the board fire the engineer?

8 MR. STILL: I believe he's a civil service
9 employee, sir. They'd have to have cause, but they can
10 fire him in that sense.

11 As this Court unanimously found in Hunter v.
12 Underwood, the president of the 1901 Alabama
13 Constitutional Convention said the purpose of that
14 convention was to establish white supremacy in this State.
15 We believe these changes perpetuate a kind of white
16 supremacy which prevents blacks from having any real power
17 over white constituents. These changes are exactly the
18 type that Congress intended to cover when it passed
19 section 5 of the Voting Rights Act.

20 To understand section 5, we think you've got to
21 understand the circumstances that led to its passage.
22 This Court in 1965 in South Carolina v. Katzenbach
23 described the situation. The southern States had resorted
24 to the extraordinary stratagem of contriving new rules of
25 various kinds for the sole purpose of perpetuating black

1 political powerlessness in the face of adverse Federal
2 court decrees.

3 Congress had reason to suppose that these States
4 might try similar maneuvers in the future in order to
5 evade the remedies contained in the Voting Rights Act
6 itself, so Congress passed section 5 of the Voting Rights
7 Act to make sure that these sorts of changes wouldn't
8 continue to be brought along every time some stratagem was
9 knocked down.

10 Section 5 is supposed to change the balance of
11 power. It's supposed to put --

12 QUESTION: Well, regardless of what it's
13 supposed to do, what it says is that you have to clear any
14 voting qualification or prerequisite to voting or standard
15 practice or procedure with respect to voting, so what your
16 burden is, in this case, is to say that changing the
17 responsibilities of one of the members of the county's
18 officership is a qualification or prerequisite to voting
19 or standard practice or procedure with respect to voting.

20 Now, you can go under section 2, if it was done
21 for a discriminatory motive, right?

22 MR. STILL: That's correct, but section 5 --

23 QUESTION: But you're talking about going under
24 section 5 and requiring it to be precleared as a standard
25 practice or procedure with respect to voting. I must say,

1 I would never in my wildest dream imagine that that
2 qualified under that language.

3 MR. STILL: Well, section 5 was designed to get
4 at new changes that were made to stop those new
5 discriminatory changes from being made, and section 2 was
6 designed to get at those that happened to slip by that and
7 the preexisting ones.

8 QUESTION: But not all changes, only a change of
9 a standard practice or procedure with respect to voting.

10 MR. STILL: That's correct, and section 14
11 defines voting as -- as encompassing all those things
12 necessary to make the vote effective, and one of the
13 things necessary to make the vote effective is that when
14 you elect a representative or a county commissioner, he be
15 able to do something -- have some power to do something.

16 QUESTION: That is necessary to make the vote
17 effective? No, indeed. My vote is just as effective.

18 MR. STILL: But the vote is effective --

19 QUESTION: You say -- you're saying my vote
20 becomes less effective somehow when -- when the Congress
21 takes away some powers that the President had before, that
22 they -- they have made my vote less effective?

23 MR. STILL: In -- in terms of electing the
24 President, but in this -- in this sense we're talking
25 about a county commissioner, and if once blacks get the

1 vote and get single-member districts so they can elect
2 county commissioners of their choice, then they find that
3 those county commissioners can't do anything for them,
4 they've had the value of their vote affected.

5 QUESTION: I understand that there has been a
6 change, and I understand that the change may well have a
7 discriminatory motivation, but I don't see how it is a
8 change with respect to voting.

9 MR. STILL: Because I think if it's -- if it's
10 covered by section 2 it could just as well be covered by
11 section 5, if it's a change since 1964. Both of them are
12 part of the Voting Rights Act. Both of them use the same
13 definition of voting. If it affects voting, and it
14 affects something necessary to make the vote effective,
15 then it affects the right to vote under section 14 of the
16 Voting Rights Act.

17 QUESTION: Well, I guess under your theory
18 any -- any reduction in funding, a lesser appropriation,
19 would also qualify for a section 5 approval.

20 MR. STILL: Some reductions in funding might be
21 covered by section 5 if they have -- if they affect
22 voting, but we do not believe that you can draw a line
23 there.

24 QUESTION: Well, from what you say it would seem
25 to me that any reduction in funding of a particular office

1 would be said to affect voting in a covered jurisdiction,
2 and yet I -- it's just almost inconceivable to think of
3 the flood of actions that would have to be reviewed if
4 your theory is correct, that that also constitutes a
5 change in voting practice or procedure.

6 MR. STILL: Well, Congress defined voting in a
7 very broad way here, because they had seen that the South
8 and other covered jurisdictions had continued to use
9 various sorts of stratagems. If the white primary was
10 declared unconstitutional, they adopted a new property
11 requirement or a new literacy test, so that there was
12 always something else, and in order --

13 QUESTION: But those do relate to voting, of
14 course, and we're getting much further afield when we talk
15 about a drop in funding or a cut in the budget or
16 whatever.

17 MR. STILL: Well, Etowah County, for instance,
18 in their brief in this case argued that it would be
19 pointless to require this to be precleared because the
20 State could always achieve the same result some other way,
21 and our point is that section 5 is written in a broad way,
22 with -- especially with the definition found in section
23 14, that is designed to get at changes which have a
24 discriminatory impact on the -- the rights of people to
25 vote, to have their vote counted effectively.

1 I think you -- I think in any case involving a
2 budget you'd probably have to look at a lot of different
3 circumstances to determine whether or not that had an
4 effect on the -- the electoral power on the people
5 eventually, or whether it was just sort of a routine
6 change in a budget. A budget -- a new budget is adopted
7 every year.

8 QUESTION: Do you take this --

9 QUESTION: But isn't your test that if you can
10 imagine a set of circumstances in which it would be
11 racially discriminatory then there has to be preclearance?

12 MR. STILL: That's correct. If you can --

13 QUESTION: Well, any time you cut an executive's
14 budget, he has less authority, so any budget-cutting has
15 to be submitted to the Attorney General.

16 MR. STILL: Well, I would suggest not every time
17 you cut a -- cut a budget. For instance --

18 QUESTION: I don't see --

19 MR. STILL: You might have a general
20 retrenchment, everybody gets a 10 percent across the board
21 cut, and this particular official gets a 10 percent cut as
22 well. That's a decrease in the budget, but that doesn't
23 necessarily affect his electoral power.

24 But if you took the example -- if you took the
25 example that the sheriff's budget had always been

1 \$10 million in a particular county, and suddenly, just as
2 soon as a black got elected, they cut the sheriff's budget
3 to \$1 million and said well, you've just got to make up
4 the rest someplace else, now that would be the kind of
5 change that certainly would have to be precleared, and I
6 would suggest for that reason we can't draw the line and
7 say, oh, well, budgets -- we're never going look at
8 budgets, because if you say, we're never going to look at
9 budgets --

10 QUESTION: Well, but -- but your test is, then
11 you have to look at all budgets.

12 MR. STILL: Then all budgets should probably
13 have to be precleared, but as a practical matter, only the
14 ones which have an effect on voting, and we have to keep
15 going back to whether it has an effect on voting, are the
16 ones that are going to -- that are going to be submitted.
17 If it doesn't affect --

18 QUESTION: Well, but it's almost backwards,
19 isn't it? I thought what you were saying was that any
20 time a budget cut affects the power of an elected office,
21 then the budget cut has an effect on voting.

22 MR. STILL: I was suggesting that there are some
23 circumstances in which it would affect the electoral power
24 of the citizens, of the voters, and so therefore that
25 change certainly would have to be precleared, and for that

1 reason I don't think that we can exclude the class of
2 events called budget adoption from coverage of section 5,
3 but it only has to be precleared if it affects voting --

4 QUESTION: In --

5 MR. STILL: So we can -- I think we can say that
6 here's a class of event, sometimes it affects voting and
7 sometimes don't --

8 QUESTION: And it affects --

9 MR. STILL: But we can't say that it never did.

10 QUESTION: It affects voting when?

11 MR. STILL: It affects voting when -- I gave
12 as -- as a hypothetical when a newly-elected black sheriff
13 finds his budget cut by 90 percent, and I would say that
14 that would be fairly clear.

15 QUESTION: And that -- that's because the people
16 who voted to elect that sheriff are now getting a sheriff
17 who has less -- less money to fund his office than
18 the -- presumably the white sheriff who was there before.

19 MR. STILL: That's correct, because in that kind
20 of situation --

21 QUESTION: Well, suppose it were a 10 percent
22 budget cut? Now, presumably that has to be precleared as
23 well. I mean, we're -- we're told that the significance
24 of the amount or the change is not important. We don't
25 look to that.

1 MR. STILL: Well, I think what you've got to
2 look at is if there was a 10 percent change. First of
3 all, the jurisdiction has two burdens here. They have to
4 demonstrate that there is no purpose, there's no intent to
5 discriminate, and secondly that it will not have the
6 effect of discriminating against people on the basis of
7 their race, so it could be that a 10 percent cut was
8 carried out for a racial intent because there's a black
9 sheriff that's just been elected.

10 QUESTION: Yeah, well, I'm just trying to find
11 out what has to be submitted to the Attorney General, and
12 presumably on your theory every budget change --

13 MR. STILL: Well, I would suggest that we -- we
14 should look also at what sort of -- what sort of actions
15 the jurisdiction takes to make the submission. They make
16 a submission by writing a letter to the Attorney General
17 of the United States, and the Attorney General writes a
18 letter back saying, I interpose no objection. In
19 between --

20 QUESTION: Well, you have -- it's a 60-day
21 waiting period, is it?

22 MR. STILL: That's correct.

23 QUESTION: So you have a natural disaster in a
24 State, and the -- the jurisdiction has to transfer money
25 from some agency to another to provide for emergency

1 relief -- let's say flood relief -- but can't do it
2 because it has to wait 60 days --

3 MR. STILL: The Attorney General doesn't have --

4 QUESTION: And it's a budget cut.

5 MR. STILL: The Attorney General doesn't have to
6 take 60 days. He took 36 hours, I think it was, with New
7 York City's districting plan that was adopted this summer
8 or last spring.

9 QUESTION: But you still haven't, at least to my
10 satisfaction, answered the question of what is your test
11 for budget submissions, and it seems to me that, as
12 Justice O'Connor suggests, every budget cut has to be
13 submitted.

14 MR. STILL: I suggest that if --

15 QUESTION: And then you're going to say, well,
16 the Attorney General might, because of a change of
17 letters, quickly approve it, but the point is whether or
18 not there's a statutory requirement for preclearance, and
19 it seems to me that you must answer the question yes,
20 based on your theory of this case.

21 MR. STILL: I think that -- I think what we
22 would have to say is that you could not exclude budgets
23 from the type of things that have to be submitted for
24 preclearance, and so if they -- if a budget in a
25 particular case --

1 QUESTION: Well, do you mind if I rephrase that
2 as saying that you must include them?

3 MR. STILL: That's right, you must include them.

4 The district court in this particular case used
5 the -- this Court's potential for discrimination test to
6 create exemptions from section 5 coverage.

7 Specifically, in Etowah County they held that
8 the reallocation of authority that was embodied in the
9 Common Fund Resolution was in practical terms
10 insignificant in comparison with the entire commission's
11 authority both before and after the disputed change to
12 allocate funds among the various districts, but the
13 category of things being insignificant or small changes
14 has never before been seen in the cases of this Court.
15 Insignificant or small changes still have the potential
16 for discrimination.

17 For instance, the transfer of a polling place in
18 Perkins v. Matthews has the potential for -- for
19 discrimination, and it has to be precleared whether the
20 polling place is being moved across the street or to the
21 other side of the district.

22 In Dougherty County v. White, there were changes
23 in personnel regulations that affected candidates. In
24 City of Lockhart v. The United States, the change was the
25 change in the number of the members of the governing body

1 of the city from three to five, and this Court held, well,
2 that was changing the amount of power each individual
3 member of that body held, and in City of Pleasant Grove v.
4 United States --

5 QUESTION: It also changed who you voted for. I
6 mean, all the other examples you mentioned actually
7 concerned the voting process -- the place of voting, and
8 so forth. That last one didn't relate to the -- to the
9 process of voting but it did relate to who you voted for.

10 MR. STILL: It did --

11 QUESTION: What you're proposing now is going
12 yet another step that neither relates to the manner of
13 voting or to who you voted for, but to the powers of the
14 person for whom you voted. You'll keep voting for the
15 same person, but he's going to have different powers. I
16 mean, once you -- once you take that last step, it seems
17 to me there's -- there's no end of what has to be
18 submitted for clearance.

19 MR. STILL: Well, I think we still have got to
20 look at the -- at the touchstone here of the potential for
21 discrimination. In --

22 QUESTION: No. The touchstone is the language
23 of the statute, which says, with respect to voting. Isn't
24 that the touchstone?

25 MR. STILL: Yes, it should be, and the -- and

1 the way in which --

2 QUESTION: It's not a freewheeling inquiry
3 into -- into discrimination.

4 MR. STILL: It -- if it affects -- if it affects
5 voting, then it is covered by the statute, and the gloss
6 that this Court has put on it is things which have the
7 potential for discrimination, and for instance, in
8 Pleasant Grove you were dealing with a situation where it
9 was expanding the city limits to include uninhabited
10 territory. Nobody was going to vote, necessarily. It
11 might be for ever and ever into the future, no one was
12 going to vote. So the change there was about the
13 potential for discrimination.

14 I would ask the Court -- if it please the Court
15 I would ask that the rest of my time be reserved for
16 rebuttal. Thank you.

17 QUESTION: Very well, Mr. Still. Mr. Long,
18 we'll hear from you.

19 ORAL ARGUMENT OF ROBERT A. LONG, JR. ON BEHALF OF
20 THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE APPELLANTS

21 MR. LONG: Thank you, Mr. Chief Justice, and may
22 it please the Court:

23 If minority voters elect a representative of
24 their choice for the first time and the jurisdiction
25 responds by stripping that official of all power, then the

1 minority citizens' vote for that official has been
2 rendered a nullity, in the language of 42 U.S.C. 1973(c),
3 their votes are not effective, so we do think that a
4 transfer of decision making authority to or from an
5 elected official is within the scope of section 5.

6 QUESTION: Excuse me. Their votes are
7 effective. They voted for this person. That person is in
8 office.

9 MR. LONG: Well, Justice Scalia, we think that
10 is --

11 QUESTION: I mean, we're not dealing with poetry
12 here. We're dealing with a -- with a statute. Are their
13 votes rendered ineffective? They're not rendered
14 ineffective.

15 MR. LONG: Well, we think citizens do not simply
16 cast votes, they cast votes for officials who will make
17 decisions of Government, and -- and a view of voting in
18 elections, that it simply involves going into a booth and
19 casting a vote is, we think, much too narrow. That's the
20 view that obtained in the old Communist regimes, where
21 everyone participated in the elections -- the turnout was
22 over 99 percent -- but the voting meant absolutely
23 nothing. It was ineffective.

24 QUESTION: Your rule, I take it, would apply to
25 statewide offices, too, if one responsibility were shifted

1 to the treasurer to the auditor, saying they were both
2 elected officials?

3 MR. LONG: Yes. If they were both elected, and
4 if it were a transfer of decision making authority, we
5 would say it was covered.

6 QUESTION: Well, what do you -- how do you
7 define decision making authority?

8 MR. LONG: The distinction we draw is between
9 the exercise of the authority to decide matters of
10 Government -- taxing, spending, substantive policy -- and
11 the transfer of those decisions from one official to
12 another. When an official simply exercises that
13 authority, it is not subject to preclearance. Thus, for
14 example, we do not think that budgets, typically, would be
15 subject to preclearance, and nor do we think that
16 substantive laws would typically be subject to
17 preclearance.

18 QUESTION: What do you mean by typically? I
19 suppose the jurisdiction has to know, either we have to
20 preclear everything or -- or we don't.

21 MR. LONG: Well, we think the rule would be
22 something very close to no, it never has to be precleared.
23 In the Etowah County case --

24 QUESTION: So you disagree with Mr. Still on
25 that?

1 MR. LONG: Yes, we disagree on that point. The
2 qualification, I would add, is in the Etowah County case
3 it appears there may have been a practice of dividing the
4 budget into equal shares and if that practice were changed
5 we would say that is a transfer of decision making
6 authority, but in general a reduction of a budget, even to
7 zero, we would say is simply the exercise of the authority
8 to make policy and doesn't result --

9 QUESTION: Why is that -- why is it different if
10 you do it through the budget than if you do it through
11 reassigning functions?

12 MR. LONG: Because --

13 QUESTION: In principle, why is it different?

14 MR. LONG: Then we regard that as the exercise
15 of the authority rather than a transfer of the authority
16 to make decisions. We think that that distinction, after
17 thinking about it for some time, is the one that best
18 effectuates the intent of Congress to cover all changes
19 affecting voting with that --

20 QUESTION: If I take all authority from you and
21 give it to another officer, that affects voting --

22 MR. LONG: Yes.

23 QUESTION: But if I take all the money at your
24 disposal and give it to another officer, that doesn't
25 affect voting.

1 MR. LONG: In our view, that's where the
2 line --

3 QUESTION: That's the line.

4 MR. LONG: Should be drawn, yes.

5 QUESTION: It seems to me that in Etowah County
6 if the budget was divided among four people and then they
7 change and it's a common fund, in both instances it was
8 under the total control of the commission.

9 MR. LONG: Well, again --

10 QUESTION: And I -- so I don't see how there's a
11 transfer of power, even under your test.

12 MR. LONG: Well, there is a -- you could say
13 that ultimately all power is delegated. The legislature
14 or the people, if it's a constitutional amendment, could
15 always change the delegation. We would say that where an
16 official has authority to make a decision that then takes
17 effect without further action, that a transfer of that
18 authority is subject to preclearance, even if it's
19 possible that some higher body could countermand that
20 decision in a particular case. That is where we draw that
21 line.

22 We think, again, that some reallocations of
23 authority plainly affect the power of a citizen's vote.
24 Allen held that a change making an elected office
25 appointive is subject to preclearance, and we think

1 the -- a case where all of the authority of an elected
2 official is transferred to an appointed official would
3 have precisely the same practical effect, so we think that
4 at least that case must be covered under the rationale of
5 Allen and other decisions of this Court saying that a
6 diminution in the effectiveness of a vote or voting power
7 is covered, and we also think --

8 QUESTION: Changing an -- an elective office to
9 an appointive, that was -- that was a square holding in
10 Allen?

11 MR. LONG: That was, yes, sir.

12 QUESTION: Yes.

13 MR. LONG: And we also think that less drastic
14 changes can affect the power of a citizen's vote. If, for
15 example, a school board were deprived of all power to tax,
16 or a minority representative on a school board were
17 deprived of all power to vote on matters affecting the
18 curriculum, that would significantly reduce the power of
19 votes for the school board, or for members of the school
20 board.

21 We think that excluding all transfers of
22 authority -- all transfers of authority would create a
23 large loophole in the statute. It would be inconsistent
24 with the basic intent of Congress to combat subtle as well
25 as obvious practices that abridge voting rights.

1 QUESTION: Does any transfer of authority count?
2 What -- you know, what is --

3 MR. LONG: Any -- any transfer of decision
4 making authority, Justice Scalia.

5 QUESTION: No matter how minor the issue
6 involved.

7 MR. LONG: Yes. We think it's settled that
8 there is no distinction at the stage of whether the change
9 must be submitted for preclearance for minor changes, and
10 we think that would be unworkable. Of course, at the
11 second stage in determining whether the change is going to
12 be precleared, that would be taken into account, and we
13 would also take into account, for example, that the change
14 was between officials who serve the same constituency.

15 QUESTION: Well, I -- once again, I could take
16 away all of the official's money, so that effectively he
17 has no more power, but if I take away one iota of his
18 theoretical authority, then that --

19 MR. LONG: That is the line we draw, Justice
20 Scalia. Again, we get there in stages. The first stage
21 of our analysis is that we think some of these changes are
22 covered. We do agree, however, that Congress did not
23 intend that every legislative enactment has to be
24 submitted for preclearance and therefore, in deciding
25 where to draw the line, we think the line that is most

1 faithful to the intent of Congress -- although it will
2 produce some borderline cases -- is to require that all
3 changes in decision making power be submitted for
4 preclearance.

5 QUESTION: Won't that pick up the vast bulk of
6 legislative enactments?

7 MR. LONG: No. We think it will --

8 QUESTION: It certainly is the nuts and bolts of
9 any legislative action I've ever witnessed.

10 MR. LONG: Well, we think, Justice --

11 QUESTION: Little adjustments here and there of
12 the authority of one State agency or another -- I mean, it
13 just happens day in and day out with most pieces of
14 legislation.

15 MR. LONG: Well, we think the transfers of
16 decision making authority are not an everyday occurrence,
17 and that officials are generally quite reluctant to give
18 up authority, and that this would cover far less than the
19 huge expansion of the scope of section 5 that appellees
20 suggest, and I also want to note that the preclearance
21 process is set up to process a large number of changes.
22 We precleared almost 17,000 changes last year in a very
23 short period of time. So --

24 QUESTION: Do you know how many of those
25 involved transfers of decision making authority?

1 MR. LONG: I do not. I know that a number
2 have --

3 QUESTION: Did any of them?

4 MR. LONG: I know that we have objected on eight
5 occasions.

6 QUESTION: There have been requests for
7 preclearance in situations involving transfers of
8 authority, though.

9 MR. LONG: Yes, there have, Justice Stevens.

10 QUESTION: Can you tell me how many of the
11 requests were denied?

12 MR. LONG: In this fiscal year we approved all
13 but 121 of those 17,000, so well over 99 percent.

14 QUESTION: Thank you.

15 MR. LONG: And finally, we would disagree with
16 appellees that our test is unworkable in practice. We
17 think that many transfers of authority will have no
18 discriminatory purpose or effect, and where there is some
19 effect we would look to this Court's statement last term
20 in *Houston Lawyers Association* that a covered
21 jurisdiction's legitimate policy reasons for a change are
22 properly weighed in making the preclearance determination.

23 So again, our position is that some of these
24 changes clearly do have a potential -- a serious
25 potential -- to dilute the effectiveness of votes, and we

1 think some of them must be covered and the line that we
2 urge the Court to draw is between changes that affect the
3 decision making power of elected officials, which we think
4 are covered -- all of them are covered -- and other
5 changes, the exercise of decision making power, which we
6 think are not covered.

7 Thank you.

8 QUESTION: Thank you, Mr. Long. Mr. Smith,
9 we'll hear from you.

10 ORAL ARGUMENT OF PAUL M. SMITH

11 ON BEHALF OF THE APPELLEES

12 MR. SMITH: Mr. Chief Justice, and may it please
13 the Court:

14 Our basic position in this case is that
15 section 5 of the Voting Rights Act applies to all changes
16 in election laws or practices but does not apply to
17 transfers of power or function among elected officials.
18 Now in drawing this line, I fully acknowledge that
19 transfers of authority among officials can be undertaken
20 for discriminatory reasons and can, in practice, affect
21 the ability of minority citizens in a particular district
22 or locale to influence the course of public policy.

23 QUESTION: Was that argument rejected in
24 Dougherty County?

25 MR. SMITH: No, Your Honor. Dougherty County

1 was a case about a specific rule which was enacted
2 which --

3 QUESTION: But that was the gist of the dissent
4 there written by Justice Powell, wasn't it?

5 MR. SMITH: Well, Your Honor, the dissent there
6 dealt with whether this thing was closely enough related
7 to election laws. It was a rule which specifically
8 focused on what happens to somebody who runs for office.
9 Justice Powell in his dissent there indicated he thought
10 it wasn't a change in election laws because it was a rule
11 that was passed through a personnel aspect of a school
12 board, but since it was a rule that said, here's what
13 happens to you when you run for office, it's certainly
14 consistent with the line I've drawn to say Dougherty
15 County affects voting, but transfers of authority don't
16 affect voting.

17 Transfers of authority instead, we believe,
18 should be governed not by section 5 with its particular
19 standards and procedures but by the conventional remedies
20 for other kinds of discrimination, if they are
21 discriminatory, which is suits under the Fourteenth
22 Amendment, in the Civil Rights Act.

23 QUESTION: What about section 2?

24 MR. SMITH: Well --

25 QUESTION: Do you -- in your view, does section

1 2 apply to this or not?

2 MR. SMITH: No, Your Honor. I think if
3 section 5 doesn't apply to something, then it's pretty
4 clear that section 2 doesn't apply. They have the
5 identical language -- standards, practices and procedures
6 with respect to voting.

7 Now, in section 5, what Congress created was a
8 unique form of Federal administrative review of State and
9 local laws with an unusually stringent substantive test,
10 and I think it's this test that's kind of gotten lost in
11 this case. It certainly isn't addressed by any of the
12 parties on the other side.

13 That test is an effects test which says that any
14 retrogressive impact caused by a change -- impact on the
15 position of minorities in the community and their
16 political power -- is enough to invalidate the change.
17 Now, that's pretty strong medicine when we have Federal
18 administrators applying a test of that sort, but what
19 Congress says is we're going to have this kind of
20 mechanism, but it's going to apply only to a particular
21 discrete category of changes -- changes in the way
22 elections are conducted, things that happen on election
23 day.

24 That, after all, is what the statute says. It
25 says, standards, practices and procedures with respect to

1 voting, it doesn't say, anything that affects power in the
2 Government, and this limitation is perfectly sensible if
3 you look back at what it was that led Congress to single
4 out a minority of political jurisdictions in this country
5 and subject them to special regulation.

6 These were jurisdictions which back in the '60's
7 had large numbers of minority residents who weren't
8 registered to vote, so the problem that existed was one
9 with respect to the conduct of elections and voting, and
10 Congress addressed that problem in two ways in the Voting
11 Rights Act in 1965.

12 First, for these specific jurisdictions it
13 suspended all literacy tests and other devices that were
14 preventing people from registering to vote, and then in
15 section 5 what it did is it essentially froze in place the
16 balance of the electoral system that those jurisdictions
17 had. It said, you -- we're going to take away your
18 literacy tests and other devices, and the rest of the
19 stuff has to stay the same, with one proviso, which was if
20 the jurisdiction could come forward and affirmatively
21 prove that there -- that a change would be at least
22 neutral in its impact on the political influence of
23 minorities, then that change could go forward.

24 Now, nothing in that sequence of events, and
25 nothing in the actual legislative record, not one word

1 cited by anybody here, suggests that Congress intended
2 this -- this freezing effect and this drastic kind of
3 Federal administrative review to extend beyond things that
4 directly relate to what happens in elections.

5 QUESTION: Have we got any cases that are even
6 close to this, in your favor?

7 MR. SMITH: Well, Your Honor, there's only two
8 cases that I'm aware of that have ever been filed that
9 didn't involve something that related to elections, this
10 case and the case of Hardy v. Wallace, which was a
11 district court case in which they said that --

12 QUESTION: So your answer is no.

13 MR. SMITH: No, Your Honor. In fact, the thing
14 that's remarkable about this case is that we're talking
15 about a vast expansion of a statute 26 years after it was
16 passed. If this was what everybody understood the Voting
17 Rights Act to apply to, you would expect that there would
18 have been thousands of lawsuits filed by plaintiffs over
19 the past 26 years.

20 Certainly it's clear that, looking at the kinds
21 of definitions of what has to be precleared that we're
22 being given here, that there have been tens and tens of
23 thousands of violations of this statute every year since
24 1965 in covered jurisdictions.

25 QUESTION: Well, certainly voting -- the term

1 voting in the statute has been given a broad definition,
2 Mr. Smith.

3 MR. SMITH: Yes, Your Honor, and I -- and I
4 certainly am not asking the Court to cut back in that
5 definition, the definition that started in Allen, but what
6 that definition says is you look at who can vote, who's
7 voting with them in the voter pool, who's on the ballot,
8 what -- where they vote, the terms of office of people, so
9 that affects when they vote.

10 But there has to be some concrete connection to
11 the events of election day, I submit, and that's certainly
12 what this Court held in Allen, and there's never been
13 anything in the governing regulations or the legislative
14 history, nothing that suggests otherwise. Indeed, it's a
15 remarkable fact that the Attorney General now for 26 years
16 has not come out with a regulation that lists anything
17 as -- as covered by the preclearance mechanism which
18 doesn't involve elections.

19 QUESTION: Well, the -- I think it's the
20 Solicitor General's brief in this case gives a few
21 examples in it of situations which might be said to be in
22 this category of cases --

23 MR. SMITH: Yes, Your Honor.

24 QUESTION: -- where it has taken action and
25 where it has -- where the Office of the Attorney General

1 has found there to be a discriminatory effect.

2 MR. SMITH: There are several examples cited. I
3 think the total amounts to something like 8 or 10 over the
4 past 26 years that they were able to find where they found
5 an illegal transfer of power.

6 QUESTION: And it is certainly possible that in
7 a covered jurisdiction that if a black person is elected
8 to a particular office that with the intent to deprive
9 that person of any power it could be removed, and under
10 your view, then, there is no remedy.

11 MR. SMITH: No. There are plenty of remedies,
12 Your Honor. The remedy is a lawsuit under the Fourteenth
13 Amendment, which is the remedy that you apply for
14 discrimination by government in every other context.

15 For example, if government decides we're not
16 going to give public services to this segment of the
17 community because the people who live there are black, the
18 remedy is a lawsuit under the Fourteenth Amendment, and
19 the same would be true here if, with racist intent, a
20 group of people take power away from somebody who is
21 elected by black constituents, or because he's black.

22 There are remedies out there. The question is,
23 is transfer of -- is a transfer of authority sufficiently
24 part and parcel of the electoral process so that it fits
25 over into this narrow box of one type of discrimination

1 that's covered by section 5?

2 QUESTION: What -- what about that -- wasn't
3 there a case in a three-judge court where there was a
4 transfer of authority to appoint a racing commission from
5 the county's legislative delegation to the Governor?

6 MR. SMITH: That was the case I cited to you a
7 moment ago, Your Honor.

8 QUESTION: Yes.

9 MR. SMITH: That's -- that's the one case.

10 QUESTION: Now, what connection did that have
11 with the voting?

12 MR. SMITH: Well, that case under our theory was
13 wrongly decided, Your Honor --

14 QUESTION: Well, I know.

15 MR. SMITH: The -- that was a case where the
16 authority was transferred from the local legislative
17 delegation to the Governor --

18 QUESTION: Exactly, and --

19 MR. SMITH: To appoint this racing commission.

20 QUESTION: You say that -- that case was just
21 wrong.

22 MR. SMITH: Yes. In fact, the Justice
23 Department said so at the time. They took the opposite
24 position in that case in --

25 QUESTION: Well, they -- they seem to think it

1 was right, now.

2 MR. SMITH: Well, yes. The point I make about
3 that is that they have -- they have, to the extent they've
4 commented on this issue, been all over the lot.

5 QUESTION: Well, they have, they certainly have.
6 They --

7 MR. SMITH: The other thing I would note about
8 that case, Your Honor, in that case Judge Vance said,
9 we're going to cover this one, but the vast majority of
10 routine transfers of authority that occur every day are
11 not, in the view of this Court, covered, so that case is a
12 thin reed on which to attach -- to support the -- the huge
13 expansion of the statute that's being proposed here by the
14 Government and by appellants.

15 QUESTION: Yeah, but I take it that you -- you
16 seem to think that there isn't any transfer, just pure
17 transfer of authority that's covered by section 5 --

18 MR. SMITH: I think you have to draw --

19 QUESTION: Is that right?

20 MR. SMITH: That is right, Your Honor. You have
21 to draw the line where Congress drew the line. It said,
22 standards, practices, and procedures with respect to
23 voting, and a transfer of authority just isn't -- doesn't
24 do that. First of all, it happens after people are in
25 office, typically. It affects incumbent officials and

1 is -- is therefore not an electoral procedural change.

2 Now, I do think it's important to focus on the
3 substantive test that gets applied under section 5,
4 because even leaving aside the plain language --

5 QUESTION: What about a transfer of power just
6 before the election? In other words, say you agree on
7 this redistricting and the consent decree, and then, in
8 advance of the election, you take away the power of the
9 person that's likely to be elected from the two new black
10 districts.

11 MR. SMITH: I don't think that makes a
12 difference, Your Honor. That is in fact what happened in
13 Hardy v. Wallace. They took the power away when the
14 outgoing white legislative delegation engineered this so
15 their successors --

16 QUESTION: You don't think that would have any
17 effect on what happens on election day?

18 MR. SMITH: Well, it doesn't change the offices
19 that are on the ballot and it doesn't change who votes or
20 how they vote. It does change the power of the people who
21 are in office, but that's true of everything the
22 Government does, virtually.

23 QUESTION: I'm not sure that's all that
24 different from changing electoral boundaries, which one
25 can argue very forcefully Congress never thought of either

1 at the time the statute was pending.

2 MR. SMITH: Well, perhaps, but certainly
3 changing electoral boundaries does affect who votes and
4 the nature of your ability to influence who gets elected
5 in the way that --

6 QUESTION: Well, it does affect who votes. Who
7 votes -- it affects the district in which you vote.

8 MR. SMITH: Right. It affects your ability to
9 elect a candidate of your choice, which has sort of become
10 the key -- the key kind of claim under section 2 of the
11 Voting Rights Act.

12 A change in what somebody does after they're
13 elected in some sense changes the nature of the office,
14 but if you're going to take that expansion, then you
15 basically are going to have the entire functions of
16 government reviewed under this preclearance mechanism.

17 QUESTION: Well, no, because the --
18 the deferring to the officer who's supposed to interpret
19 this statute for us, he says you can draw a meaningful
20 line between budget changes and reallocations of power,
21 and implicitly he's suggesting that maybe there aren't
22 as -- the millions of these problems out there that your
23 brief suggests, and I thought you're probably right.

24 Maybe there are an awful lot of these. But how
25 do we know how often there are transfers of power of this

1 kind?

2 MR. SMITH: It's a matter of common sense, Your
3 Honor. Think how many State laws are passed by every
4 State legislative -- in every State legislative session
5 which in some way affect the relative distribution of
6 power between the Governor of that State and the
7 legislature. Every time they pass a new program, or
8 repeal a program, or modify a program, that's going to
9 take power away from --

10 QUESTION: Well, I don't understand them to be
11 going that far.

12 MR. SMITH: Certainly their brief makes it
13 absolutely clear that a transfer of authority from a
14 legislative branch to a Governor --

15 QUESTION: Correct.

16 MR. SMITH: -- would be covered, and I'm simply
17 pointing out that legislation does that by its very
18 nature. Whenever you take --

19 QUESTION: Well, it does if you accept -- if you
20 include all the budget changes and all that sort of thing,
21 but --

22 MR. SMITH: Well, what about -- just to focus on
23 budgets for a moment, if you look at a State legislative
24 budget, it cuts money here and it adds money there, but it
25 also will include hundreds of different specific

1 requirements telling the Governor when the Governor can
2 move money from this line item to this line item, how much
3 flexibility they have here and there. All of that
4 is -- is the distribution --

5 QUESTION: Yes, but I don't understand the
6 Solicitor General to be saying those are included. Maybe
7 I'm misunderstanding him, and I know logically -- I
8 understand the logic of the argument. Often we -- you
9 know, we draw arbitrary lines, and that's what he's
10 saying. There's kind of an arbitrary line, here. It has
11 to be a transfer of power, sort of, that you can look at
12 it and say, this decision used to be made by Mr. A and
13 it's now going to be made by Mr. B.

14 MR. SMITH: Well, that's what happens when a
15 legislature delegates power to the Governor. The decision
16 used to belong to the legislature. Now it belongs to the
17 Governor. Or if they take it back, it's exactly the same
18 thing.

19 I'm merely applying their test, which they claim
20 in some way limits the scope of the act, but it doesn't
21 have that effect. The decision making authority is
22 changed every day. Now --

23 QUESTION: I had assumed that they were as
24 categorical as you said, and I had assumed that the reason
25 they were was to the extent that there's any vagueness at

1 all in the test, it's going to have to be decided by this
2 Court, not by some court of appeals, because it'll come
3 out of a three-judge court and come here as an appeal,
4 just as this one is, so the test has to be very, very
5 clear.

6 MR. SMITH: Well, let me return for a moment, if
7 I might, to how this would get decided under the
8 substantive standard in section 5, which is a point that I
9 think is important.

10 This effects test does not limit Federal
11 interference to situations of actual, intentional
12 discrimination, which may have been the case in that Hardy
13 v. Wallace example. What it does if you apply it to
14 transfers of power is, it prevents power from being
15 transferred for whatever reason from an official who is
16 subject to greater minority influence and control to an
17 official with less minority influence and control.

18 The only way that I can imagine that being
19 applied is -- is to have a rule that says, if you've got
20 an official over here with a high percentage of minority
21 constituents and an official over here with fewer, you
22 simply cannot move power, under that effects test, from
23 the one official to the other. That is, in fact, what you
24 would have to do if you tried to apply that kind of
25 substantive standard, which was designed for election

1 procedures, in this much broader context of transfers of
2 authority.

3 So, for example, just to give an example, if a
4 State had an existing arrangement under which total
5 control over the creation of school curricula was
6 delegated to local school districts and the State then,
7 for its own good and legitimate reasons, decided to take
8 back a chunk of that power and say -- tell all the school
9 districts they have to teach science in all 4 years of
10 high school, or just set a State curriculum in the science
11 area, that would be the transfer of a chunk of authority
12 over school curricula from local officials subject to
13 local control to the State level.

14 The appellant's theory is not only that that
15 would have to be precleared -- indeed, every time the
16 State changed whatever curricula requirements it has it
17 would have to be precleared -- it would not only have to
18 be precleared, but in every case where the local school
19 district has more black residents than the State as a
20 whole, it would be prohibited from making that change,
21 because it would have the effect of transferring influence
22 over that policy decision from a smaller group of people
23 where blacks may predominate to a larger group of
24 people -- the population of the whole State -- where
25 blacks don't predominate.

1 So unless you're going to ignore the substantive
2 test that Congress set out in section 5, you're going to
3 end up with -- with results which are just so far beyond
4 what Congress could have imagined it was doing that they
5 call into question the entire statutory interpretation.

6 Going back just for a moment to the issue of the
7 frequency with which this happens, the school example, I
8 think, makes it clear that you're going to have a huge
9 number of cases in which State government will transfer
10 authority back and forth between the State level and the
11 local level.

12 Any time a State law addresses local government,
13 what they're doing is, they're saying you should zone in
14 this way, don't zone in this way, run your schools this
15 way, you're allowed to have cable television in your
16 county or you're not -- those kinds of things. All of
17 that is a transfer of decision making authority.

18 It all may be phrased in different ways, but
19 ultimately if you're going to have a principle like this
20 you're going to have a huge number of laws like that, and
21 of course, at the local level the number of times that a
22 city council may tell the mayor what to do, or the county
23 commissioners may divide up their delegated executive
24 functions in Etowah County or Russell County are going
25 to -- are going to be nearly infinite, and all of those

1 things would then be subject to this effects test and to a
2 preclearance process which is going to change the way
3 government is really conducted in these jurisdictions.

4 You're going to have to prepare this package of
5 stuff, send it in and wait 60 days for almost every law
6 that gets passed in order to be -- be confident that
7 you're not going to be subject to legal challenge at some
8 later date.

9 QUESTION: Well, and I -- and I guess the
10 Attorney General cannot clear it if -- if it does fail the
11 effects test.

12 MR. SMITH: Let's -- the -- the Attorney General
13 is required not to preclear it if it fails the effects
14 test, and then when the Attorney General says well, I'm
15 just not convinced on this; you don't have any
16 administrative review. Your only alternative at that
17 point is to go to the District of Columbia district and
18 file a declaratory judgment action where you bear the
19 burden of proving that this change is legal under the
20 standards of section 5.

21 QUESTION: May I ask you one other question? In
22 this particular case, under your view, what should be done
23 as to the other -- the two -- two unprecleared
24 resolutions, one by each county? Do you think they should
25 go back for trial on the constitutional issue? Is that

1 what happens?

2 MR. SMITH: Yes, Your Honor. I do think that
3 the constitutional claim and perhaps the title VI claim
4 may be open. I don't think the section 2 claim is open,
5 and I -- and I think it's pretty likely that the Fifteenth
6 Amendment claim doesn't work, but there is a Fourteenth
7 Amendment claim for sure, and that was pleaded from the
8 beginning, and the Court left that open.

9 Let me just make -- make one final point about
10 this question of how many things would be subject to legal
11 challenge. There is no statute of limitations in
12 section 5. If something is done that should have been
13 precleared and isn't, then it can be challenged at any
14 time thereafter, and if we look at how many things might
15 be viewed as involving some kind of transfer of
16 authority -- and we have appellants here saying every
17 budget that's ever passed could be viewed in that way and
18 should be precleared -- then we have to think about how
19 many things have been done in these jurisdictions since
20 1965 that now would be called into legal jeopardy if
21 appellants' and the Government's interpretation of the
22 statute were accepted.

23 Essentially, you'd have utter chaos in these
24 nine States and part of seven others that have been
25 operating under this statute for these years. Whole

1 departments of State government have been created since
2 1965. Money has been shifted and power has been shifted
3 in innumerable ways as government has evolved, naturally,
4 over that period of time, and no one would have any idea
5 what the law was. You -- you'd spend years sorting all
6 that out in court as people tried to figure out, does this
7 particular law in some way represent a redistribution of
8 authority different from that in effect on November 1,
9 1964?

10 So it's not just a question of prospectively how
11 much would have to be reviewed and whether the Justice
12 Department could really do any good, looking at this
13 mountain of tens of thousands of things they would receive
14 every day, but going backwards you would basically have
15 the settled expectations of everybody in those
16 jurisdictions upset for a considerable period of years to
17 come.

18 Now, in view of all this, it seems clear to us
19 that Congress, whatever its concern about voting rights in
20 1965, couldn't have intended to transform the Justice
21 Department into an administrative overseer of whole chunks
22 of substantive legislation and other things that in some
23 way could be viewed as affecting the authority of
24 officials.

25 As Justice Powell pointed out in that dissent in

1 Dougherty that we discussed, Justice -- I was discussing
2 with Justice Blackmun, there is an enormous intrusion here
3 on State government. Whenever you have a Federal review,
4 administrative review of State statutes, but at least the
5 section 5 intrusion is tempered by the fact that it's
6 limited to a discrete area of law, voting laws.

7 At this point, that whole limitation would be
8 basically lost, and you would have the Federal Government
9 looking at almost everything the State's doing and telling
10 it whether it can go ahead or has to file a lawsuit to get
11 permission to go ahead, and as I suggested before, I think
12 that it's -- it's very unlikely that the Justice
13 Department would find that needle in a haystack if there
14 was one, it would be able to say look, here out of this
15 20,000 we got today, these two don't look too good to us,
16 because maybe they're doing it for racist motives and
17 we're going -- we're going to tell them not to do those
18 two.

19 The likelihood of any benefit coming from
20 this --

21 QUESTION: It doesn't matter whether it's
22 racist -- racial motives or not.

23 MR. SMITH: That's one of the things that can be
24 a basis for invalidating a change -- purpose or effect.

25 QUESTION: No, no. But I mean, the Justice

1 Department would have to invalidate not only those that
2 have racist motives but those that have racist effects,
3 whether or not they have racist motives.

4 MR. SMITH: Either way, yes.

5 QUESTION: If -- if they just take power from a
6 black electorate and give it to a white one.

7 MR. SMITH: Right.

8 QUESTION: And I -- and I take it that if blacks
9 have been newly enfranchised at the local level, that
10 would prevent transfers away from the local government,
11 but then if they make certain gains in the State
12 legislature it would work the other way.

13 MR. SMITH: Sure. Sure. The -- whichever way
14 it goes, there's going to be situations in which there's
15 going to be a possibility that blacks are losing power. I
16 mean, it doesn't -- you can imagine hypotheticals all
17 different ways.

18 Just to summarize, our position is that
19 section 5 should be limited to things that directly affect
20 the way elections are conducted and that the separate area
21 of reallocations of authority is not being left without a
22 remedy, but that that remedy is the standard
23 constitutional lawsuit that's brought for all different
24 kinds of discrimination, and that Congress obviously never
25 contemplated this kind of expansion of the statute.

1 If there are no further questions --

2 QUESTION: Thank you, Mr. Smith. Mr. Still, you
3 have two minutes remaining.

4 REBUTTAL ARGUMENT OF EDWARD STILL

5 ON BEHALF OF THE APPELLANTS

6 MR. STILL: Thank you. May it please the Court,
7 the position of the appellees is much more radical than
8 the position of the district court below, because the
9 district court below held that we still had viable
10 section 2 claims. Take a look at footnote 21 of the
11 district court opinion.

12 They said we can still go back and try our
13 section 2 claims. They were not ruling those out, so they
14 were still saying these things may affect voting, and by
15 us holding against you on section 5, we're not holding
16 that they don't affect voting, we're just saying they're
17 insignificant, or you didn't meet the change in
18 constituency rule that we have now engrafted onto
19 section 5, but as we've all, I think, agreed here today,
20 section 2 and section 5 establish essentially congruent
21 standards.

22 They cover the same territory. One of them is
23 designed to -- to stop things as they get passed, and the
24 other one is designed to catch those things that get
25 through and those things that pass before the 1965 Voting

1 Rights Act was passed.

2 This is not a budget case. We've spent a lot of
3 time talking about budgets. This is a case about the
4 transfer of power. Voters used --

5 QUESTION: Do you think the respondent's or the
6 appellee's position here really requests a greater relief
7 than they got in the three-judge court?

8 MR. STILL: To the extent that they suggest
9 and -- and ask this Court to hold that we no longer have a
10 section 2 claim if we don't have a section 5 claim, then
11 they're getting more than they had in the court below, and
12 they did file --

13 QUESTION: So they have a different -- they have
14 a different and broader test for invalidation?

15 MR. STILL: That's right, but they -- but
16 they're asking for greater relief than they got, and
17 they're not -- they didn't file an appeal.

18 I appreciate the Court's time. Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Still.
20 The case is submitted.

21 (Whereupon, at 2:53 p.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

90-711 and 90712 LAWRENCE C. PRESLEY, ETC., Appellants v.

ETOWAH COUNTY COMMISSION, ET AL. and ED PETER

MACK AND NATHANIEL GOSHA, III, ETC., Apellants v.

RUSSELL COUNTY COMMISSION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

(REPORTER)

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